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No. 14-1375

IN THE
Supreme Court of the United States

CRST VAN EXPEDITED, INC.,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondent Equal Employment Opportunity Commission ("EEOC") required Petitioner CRST Van Expedited, Inc. ("CRST") to litigate more than 150 separate, individual claims of sexual harassment based on the EEOC's misrepresentation to the district court that the EEOC had valid factual and legal grounds for each claim. Even though the courts below held that the EEOC had wholly "abdicated" its statutory obligations to investigate, find reasonable cause, and attempt to conciliate each individual claim before filing its lawsuit, the EEOC escaped financial responsibility for its statutory violation by arguing that CRST did not prevail "on the merits."

Just as the EEOC over-reached in *Mach Mining*[1] by arguing that the question whether it had satisfied its statutory pre-suit conciliation requirement is beyond judicial review, the EEOC contends in this case that it can violate *all* of Title VII's pre-suit requirements (investigation, reasonable cause determination, and conciliation) with impunity and impose millions of dollars in unnecessary litigation fees and expenses on defendant employers.

The decisive reason why petitioner should be awarded fees based on the EEOC's decision not to comply with those pre-suit requirements is that such an award fulfills Congress's reason for enacting the pre-suit requirements. When in 1972 Congress authorized the EEOC to litigate in its own right and not through the Department of Justice, Congress sought to protect

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[1] *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015).

courts and employers from the cost and disruption of the EEOC's assertion of unfounded claims by requiring that the EEOC not file suit until after it has investigated, found reasonable cause, and attempted to avoid litigation through conciliation. *See EEOC v. Hickey-Mitchell Co.*, 507 F.2d 944, 948 (8th Cir. 1974); *EEOC v. Allegheny Airlines*, 436 F. Supp. 1300, 1307 (W.D. Pa. 1977). Consequently, if the EEOC files suit without having first investigated, found reasonable cause, and attempted to conciliate, the defendant employer should be protected from loss through Title VII's attorneys' fee provision. Just as the Eighth Circuit did below, the EEOC's brief ignores this fundamental consideration.

I. The EEOC Wholly Failed to Satisfy Title VII's Pre-Suit Requirements.

The EEOC's effort to justify its conduct in this case is refuted by the record and the decisions below. Both lower courts found that this case involves the EEOC's flagrant violation of all three of its Title VII pre-suit obligations. The district court found that the EEOC had "wholly abandoned" its statutory obligations to investigate, find reasonable cause, and attempt to conciliate before filing suit. Pet. App. 204a. The Eighth Circuit similarly found that "[t]he present record confirms that the EEOC wholly failed to satisfy its statutory pre-suit obligations as to these 67 women. . . ." Pet. App. 115a-116a. Indeed, the EEOC admitted below that it had not investigated, found reasonable cause, or sought to conciliate any of the 67

claims dismissed for its failure to do so because it did not even know of the claims when it filed suit.[2]

Thus, the courts below did not, as the EEOC argues, engage in a more extensive review of the EEOC's administrative process than *Mach Mining* permits and find that the EEOC's conciliation efforts were merely "insufficient." EEOC Br. at 8, 19-20. There was *no* investigation, determination of reasonable cause, or conciliation of these 67 claims.

The fact that the EEOC investigated the original charging party's claim provided no basis for asserting claims that other individuals suffered sexual harassment on CRST's trucks. Although the EEOC sought to establish that CRST had engaged in a pattern or practice of tolerating such sexual harassment, the district court found that the EEOC had not presented even a *prima facie* pattern-or-practice case. The EEOC then elected not to appeal the district court's summary-judgment ruling rejecting EEOC's pattern-or-practice allegations. Thus, there was no "class" here, as the EEOC has argued, but instead merely a large group of unrelated individual claims.

The EEOC also has no basis for arguing that this Court's decision in *Mach Mining* raises questions about the propriety of the dismissal of the 67 claims involved here. *Mach Mining* decided only whether the EEOC's conciliation efforts are subject to judicial review and, if so, what the EEOC must do to comply with the

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[2] EEOC Resistance to CRST's Motion for an Order To Show Cause at 7-8 in *EEOC v. CRST Van Expedited, Inc.*, 1:07-cv-0095-LRR (N.D. Iowa May 15, 2009), ECF No. 229.

conciliation requirement. In this case, the EEOC not only failed to conciliate these 67 claims, but admittedly did not investigate or find reasonable cause for them before it filed suit. *Mach Mining* confirms that the EEOC must, through its investigation and determination of reasonable cause, identify the claims it intends to litigate because otherwise conciliation would be futile:

> EEOC, to meet the statutory condition, must tell the employer about the claim—essentially, what practice has harmed which person or class—and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance.... If the Commission does not take those specified actions, it has not satisfied Title VII's requirement to attempt conciliation.

135 S. Ct. at 1652.

Here, unlike the EEOC's class sexual discrimination claim in *Mach Mining*, these highly individualized claims would have had to be investigated, determined to be supported by reasonable cause, and conciliated on a claim-by-claim basis. These claims involve different alleged harassers, different times and locations of the alleged harassment, and different kinds and degrees of alleged harassment.

The EEOC also argues that, under *Mach Mining*, dismissal was inappropriate here and that it should have been allowed, after discovery had been completed and just weeks before the trial date, for the very first time to investigate, find reasonable cause, and

conciliate these 67 claims. EEOC Br. at 12 & n.2. The EEOC fails to note that, when it began to assert a host of individual claims, ultimately totaling 270 claims, CRST moved for relief on the ground that such a sudden proliferation of claims strongly suggested that the EEOC did not have factual or legal support for the claims. The district court denied CRST's motion based on the EEOC's unequivocal representation that it had reasonable grounds for each of the claims.[3]

During the following months, CRST took the depositions of 154 individual EEOC claimants[4] and engaged in expert discovery on the EEOC's pattern-or-practice allegations. CRST moved to dismiss these 67 claims on statutory pre-suit requirement grounds only after the district court rejected the EEOC's pattern-or-practice allegations and held that there was no "class" claim here but instead unrelated individual claims. By that point, CRST had incurred millions of dollars in attorneys' fees and expenses in litigating these 67 claims because the EEOC had not investigated, found reasonable cause, or conciliated any of these 67 claims even though the EEOC had misrepresented to the district court that it had valid grounds for each claim. Therefore, the injury sustained by CRST because of the EEOC's tactics could not possibly be cured by 67 *nunc pro tunc* administrative investigations,

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[3]The district court also cautioned EEOC that if its representation proved false, CRST could seek a remedy. Pet. App. 39a.

[4]116 of EEOC's original 270 individual claims were dismissed, including 99 because the claimants did not appear for their depositions. Pet. App. 39a-40a.

reasonable-cause determinations, and conciliation attempts.

II. The Eighth Circuit Ruling Conflicts With Three Other Circuits' Holdings.

The EEOC is plainly wrong in contending that "there is no disagreement in the circuits on the question presented." EEOC Br. at 9. The Fourth, Ninth, or Eleventh Circuits have held that a dismissal of a case based on the EEOC's failure to satisfy Title VII's pre-suit requirements entitles the prevailing defendant to an attorneys' fee award if the *Christiansburg* unreasonableness standard is met.[5] *See EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 152-54 (4th Cir. 2014); *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1261 (11th Cir. 2003); *EEOC v. Pierce Packing Co.*, 669 F.2d 605, 608-09 (9th Cir. 1982). The EEOC fails to distinguish these cases.

In *Propak*, the Fourth Circuit affirmed the district court's fee award to the defendant employer because the EEOC "acted unreasonably in initiating the litigation" without having identified potential individual claimants during its investigation. 746 F.3d at 152-54. The EEOC tries to distinguish *Propak* by noting that summary judgment was granted by the district court on the ground of laches, not failure to satisfy Title VII's pre-suit requirements. However, the EEOC ignores the fact that the laches holding in *Propak* was based on the fact that when it filed suit the EEOC was unable to identify any claimants, just as it filed suit here without

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[5] *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

being able to identify the 67 claims involved in this case. *See EEOC v. Propak Logistics, Inc.*, Civ. A. No. 09 cv 311, 2013 WL 1232959, at *4 (W.D.N.C. March 27, 2013) (record citations omitted), *aff'd*, 746 F.3d 145 (4th Cir. 2014), *Propak Logistics, Inc.*, 746 F.3d at 148-49.

Moreover, the Fourth Circuit specifically held that the district court's award of attorneys' fees was not based on its laches ruling, but instead on the EEOC's filing a lawsuit when it could not identify any claimants and had no basis for obtaining relief. 746 F.3d at 152. That is very similar to what happened here.

The EEOC also ignores the fact that in *Propak* it did not contest that the defendant had "prevailed" for purposes of obtaining an attorneys' fee award. *Id.* at 151 n.8. The EEOC has not even tried to rationalize why the defendant in *Propak* admittedly qualified for a Title VII fee award, but CRST does not. No valid distinction is possible.

The EEOC's effort to distinguish *Pierce Packing* bears little resemblance to what was actually decided in that case. The EEOC erroneously contends that the main issue in *Pierce* was whether the EEOC was required to conduct its own investigation or could instead rely on an investigation by the Department of Labor ("DOL"). EEOC Br. at 16-18. In fact, both the district court and Ninth Circuit held that Title VII required the EEOC to undertake its own investigation, make a reasonable cause determination, and attempt conciliation before filing suit. 669 F.2d at 607-08. When a preliminary settlement agreement failed, the EEOC filed suit without complying with those statutory pre-suit requirements. *Id.* at 608. The Ninth Circuit never

even suggested that the DOL investigation would satisfy the EEOC's obligations under Title VII.

The EEOC also erroneously argues that the Ninth Circuit affirmed the district court's award of attorneys' fees against the EEOC based solely on the absence of an abuse of discretion. EEOC Br. at 17. To the contrary, the Ninth Circuit specifically held that the record supported the fee award based on the EEOC's violation of its statutory pre-suit obligations:

> The district court found that: "These procedural and regulatory defects committed by the EEOC were clearly cognizable at an early stage in this litigation's history. The EEOC's obvious disregard for such promulgated regulations is the apex of unreasonableness." There is adequate support in the record to uphold this finding.
>
> . . . The only abuse of discretion which has been shown has been the premature filing of this case by the EEOC.

Pierce Packing, 669 F.2d at 609.

The EEOC's attempt to distinguish the Eleventh Circuit's decision in *Asplundh* is also flawed. The EEOC does not deny that the Eleventh Circuit held that a fee award to the defendant is appropriate if the EEOC brought suit without satisfying Title VII's pre-suit obligations. Instead, the EEOC argues that, under *Mach Mining*, the Eleventh Circuit erred in finding a violation of the pre-suit obligations. EEOC Br. at 15-16. But the statutory violation and the fee award are two separate holdings, and the fee award is a valid

precedent in the Eleventh Circuit for any subsequent case in which the EEOC is found to have violated Title VII's pre-suit requirements and the case has been dismissed.

Given that the Eighth Circuit categorically held in this case that fees cannot be awarded to CRST even though the EEOC unquestionably failed to investigate, find reasonable cause, and conciliate before filing suit, there is a clear and direct circuit conflict.

III. *Arbaugh* Also Cannot Be Distinguished.

Just as the EEOC cannot distinguish *Propak*, *Pierce*, and *Asplundh*, it also cannot logically explain how Title VII's numerosity requirement is a "merits" issue, as this Court held in *Arbaugh*, but Title VII's pre-suit requirements are not. Indeed, Title VII's pre-suit requirements are more of a merits issue than numerosity because the EEOC's compliance with then defines the nature and scope of the claims it is permitted to litigate. The Eighth Circuit explained this point in the prior appeal in this case:

> The original charge is sufficient to support EEOC action, including a civil suit, for any discrimination stated in the charge or *developed during a reasonable investigation of the charge, so long as the additional allegations of discrimination are included in the reasonable cause determination and subject to a conciliation proceeding.*

Pet. App. 109a (emphasis in original), *quoting EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 668-69 (8th Cir. 1992).

The EEOC's brief does nothing more than repeat the Eighth Circuit's question-begging distinction of this case from *Arbaugh*, and thus fails to show any actual difference:

> Title VII's employee-numerosity limitation is merits-related because it determines whether an employer is subject to—and thus can violate—Title VII. Title VII's pre-suit requirements, in contrast, have nothing to do with establishing whether the statute was violated; instead, compliance with those requirements simply permits the EEOC to try to establish a violation in court.

EEOC Br. at 13; *see* the Eighth Circuit's similar statement at Pet. App. 23a.

Plainly, the numerosity requirement has no bearing on whether Title VII has been violated. There are many employers with 15 or more employees that are not violating Title VII. The numerosity requirement determines only whether Title VII applies to the employer in question, not whether it has been violated.

On the other hand, if the EEOC investigates a charge, determines that the charge is supported by reasonable cause, and unsuccessfully attempts conciliation, the EEOC is authorized to assert a claim in court that the employer has violated Title VII based on the evidence that supports its reasonable cause determination. If instead, the EEOC determines that the charge is not supported by reasonable cause, for that very reason the EEOC cannot claim that the employer violated Title VII. Consequently, the pre-suit

requirements are much closer to the core merits of a Title VII claim than the numerosity requirement.

IV. There Is No Reason To Delay Resolution of the Circuit Conflict.

The EEOC illogically argues that it would be premature for the Court to decide this attorneys' fee issue because *Mach Mining* recently clarified the extent of judicial review of the EEOC's satisfaction of its Title VII conciliation obligation. EEOC Br. at 18. *Mach Mining* is relevant only to whether EEOC filed suit without satisfying Title VII's pre-suit requirements, not whether attorneys' fees can be awarded when, as here, the EEOC's violation of those requirements has been established. As discussed above, the lower courts' decisions finding that the EEOC failed to satisfy the statutory pre-suit requirements are fully consistent with *Mach Mining*. Moreover, this case goes well beyond the EEOC's failure to conciliate, which was the only issue in *Mach Mining*. The EEOC litigated these 67 claims even though it admittedly did not investigate, find reasonable cause, or attempt to conciliate a single one of these claims. Indeed, when the EEOC filed this suit, it was not even aware that these claims existed.

Delaying resolution of the circuit conflict will serve only to deny CRST the attorneys' fee award that Congress intended to provide under these extraordinary circumstances—and result in such awards being granted or denied depending solely on the circuit in which the EEOC filed suit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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